

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Minnesota Department
of Natural Resources Special Permit
#16868 (December 12, 2012) Issued to
Lynn Rogers

**ORDER REGARDING
MOTION IN LIMINE TO EXCLUDE
WITNESSES AND TESTIMONY**

This matter is before Chief Administrative Law Judge Tammy L. Pust on Dr. Lynn Rogers' Motion in Limine to Exclude Witnesses and Testimony. Rogers filed the motion on February 21, 2014. The Minnesota Department of Natural Resources (Department) filed its memorandum in opposition to the motion on February 24, 2014. Oral argument on the motion was held on February 24, 2014 at the Office of Administrative Hearings in St. Paul, Minnesota. The motion hearing record closed on that date.

David R. Marshall and Leah C. Janus, Fredrikson & Byron, P.A., appeared on behalf of Dr. Lynn Rogers (Rogers).

David P. Iverson, Linda S. Jensen and Oliver J. Larson, Assistant Attorneys General, appeared on behalf of the Department.

Based on the submissions of the parties, the oral argument, and for the reasons set forth in the Memorandum attached hereto, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. To the extent that it seeks to exclude the testimony of identified fact and expert witnesses on the basis of untimely disclosure, Rogers' Motion in Limine is **DENIED**.

2. To the extent that it seeks to exclude identified testimony of Dr. Craig Packer or to limit the introduction of the deposition testimony of Dr. Thomas Smith, Rogers' Motion in Limine is held in abeyance pending further order.

Dated: February 25, 2014

s/Tammy L. Pust

TAMMY L. PUST

Chief Administrative Law Judge

MEMORANDUM

I. Background

Following the first prehearing conference in this matter, the undersigned Administrative Law Judge issued a First Prehearing Order on October 11, 2013. The First Prehearing Order included a discovery deadline of December 31, 2013, and required the parties to file individual Witness Lists and a Joint Exhibit List by February 3, 2014. The hearing in the matter was scheduled to commence on February 24, 2014.

Within the discovery period and pursuant to Rule 33, Minn. R. Civ. P., Rogers served upon the Department the following interrogatory:

Interrogatory No. 19: All disclosures set forth in Administrative Procedure Act Rule 1400-6700, subpart 1(A).^{1]}

In this request, Rogers sought the information required by the cited rule, as follows:

Each party shall, within ten days of a written demand by another party, disclose the following: (A) The names and addresses of all witnesses that a party intends to call at the hearing, along with a brief summary of each witness' testimony. All witnesses unknown at the time of said disclosure shall be disclosed as soon as they become known.²

Within the requisite timeframe, the Department responded: "DNR has not yet made the determinations set forth in Minn. R. 1400.6700. Discovery is ongoing and this Answer may be supplemented as required by Minn. R. Civ. P. 26."³ The Department never supplemented this response.

¹ February 21, 2014 Affidavit of Jessica Edwards (Edwards Aff.), Ex. A at p. 18.

² Minn. R. 1400.6700, subp. 1(A).

³ *Id.*

At least as early as December 2013, the Department was in contact with various individuals seeking to determine whether they would agree to testify at the hearing of this matter.⁴ According to the statements of its counsel, the Agency did not make its final decisions regarding the identification of its witnesses until sometime in January 2014.

By agreement of the parties, discovery continued beyond the deadline specified in the First Prehearing Order. The depositions of Dr. Lynn Rogers and his primary associate, Susan Mansfield, were taken on January 23 and 29, 2014, respectively.

On February 3, 2014, the parties filed their Witness Lists. Four days later, on February 7, 2014, the Department filed an Amended Witness List wherein it added the name of one witness, Ms. Jennifer Westlund, explaining that this name had been inadvertently omitted from its earlier filing. As the result of a change in administrative staff, the Department did not review its earlier submitted discovery responses and thereby failed to formally supplement its earlier response to Interrogatory No. 19.

On February 21, 2014, Rogers filed the present motion seeking to exclude seven of the Department's identified fact witnesses and three of its expert witnesses on the basis that none of them had been identified in the Department's response to Interrogatory No. 19 within the specified discovery period. Further, Rogers seeks to exclude the proffered expert testimony of Dr. Craig Packer for lack of sufficient qualification,⁵ and to exclude the expert testimony of Dr. Tom Smith on topics which were beyond the scope of the witness's direct examination offered by Rogers.

II. Determination

A. The Identified Witnesses Will Not be Excluded As Untimely Disclosed.

Triers-of-fact, including administrative law judges,⁶ are vested with broad discretion with regard to ruling upon objections to proposed witnesses and testimony, including that of proposed experts, in cases where information has not been identified prior to hearing as required applicable rules of discovery.⁷ That discretion should be exercised in a manner that prevents "unjust surprise and prejudice."⁸ The following four factors guide the court's determination of whether exclusion is required: "(1) the reason

⁴ One witness who is a subject of the present motion, Ms. Shelly Beyer, testified by deposition that she had informed her mother in December that she might take part in the hearing, but apparently did not finalize those plans until sometime in January as evidenced by the fact that her mother was "surprised" when she made the trip from New Jersey to Minnesota to testify on February 24, 2014.

⁵ This issue is not addressed in the present Order and instead is held in abeyance pending further submissions.

⁶ See *First Nat'l Bank of Shakopee v. Dept. of Commerce*, 310 Minn. 127, 135, 245 N.W.2d 861, 866 (1976) (noting that same discretion should be accorded to administrative proceedings).

⁷ *Phelps v. Blomberg Roseville Clinic*, 253 N.W.2d 390, 394 (Minn. 1977); *Dorn v. Home Farmers Mutual Ins. Assn.*, Minn., 220 N.W.2d 503, 506 (1974).

⁸ *Fritz v. Arnold Mfg. Co.*, 305 Minn. 190, 194-95, 232 N.W.2d 782, 785-86 (1975), citing *Gebhard v. Niedzwiecki*, 265 Minn. 471, 122 N.W.2d 110 (1963); *Lundin v. Stratmoen*, 250 Minn. 555, 85 N.W.2d 828 (1957).

why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors.”⁹ Despite the court's broad discretion, exclusion of evidence is a harsh sanction which should not be lightly invoked.¹⁰

In the present case, it is not clear that the Department's identification of its witnesses was untimely. The Department did not identify its witnesses by the discovery deadline of December 31, 2013, the date set by the Administrative Law Judge in the First Prehearing Order. However, the parties continued to conduct discovery until at least January 29, 2014, the date on which Susan Mansfield was deposed. Judged with respect to this date, the Department's disclosures followed only five days later on February 3, 2014.

In response to questioning from the Administrative Law Judge, the Department's counsel indicated on the record at the motion hearing that final decisions had not yet been made until some point in January, in some cases in very late January. The rule itself requires that “[a]ll witnesses unknown at the time of said disclosure shall be disclosed as soon as they become known.”¹¹ If the decisions were not made until late January, then the disclosure made on February 3, 2014 was in fact timely under the rule in that it constituted disclosure “as soon as they bec[a]me known.”

No matter when the Department's decisions were made concerning which witnesses would ultimately testify, the record clearly establishes that the disclosure was timely as measured by the deadline provided by the Administrative Law Judge in the First Prehearing Order. In appropriate circumstances, a court's duly issued scheduling order is entitled to be given precedence over a discovery rule requiring automatic disclosures, including those based on a duty to supplement earlier discovery responses.¹² The scheduling order issued in this case addressed the issue of the “identify[ication] and exchange [of] documentary evidence intended to be introduced at the hearing” in accordance with the authority provided in Minn. R. 1400.6500 and the court's foundational authority to issue necessary and proper orders designed to manage the efficient and fair presentation of evidence at the hearing.¹³ The Department's compliance with the witness disclosure deadline set forth in the First Prehearing Order provided Rogers with sufficient and reasonable notice of which fact and expert witnesses the opposing party intended to call to testify at the hearing, and allowed Rogers an additional three weeks to contact non-party fact witnesses or demand additional disclosure if he deemed the descriptions of the experts' testimony to be insufficient. Rogers chose not to avail himself of either of these options.

⁹ *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998), quoting. See also *Citizens Bank of Batesville, Arkansas v. Ford Motor Co.*, 16 F.3d 965, 966-67 (8th Cir. 1994).

¹⁰ *State v. Lindsey*, 284 N.W.2d 368, 374 (Minn. 1979); *In re Conservatorship of Smith*, 655 N.W.2d 814, 821 (Minn. Ct. App. 2003).

¹¹ Minn. R. 1400.6700, subp. 1(A).

¹² See *Ford v. Chicago, M., St. P. & P. R. Co.*, 294 N.W.2d 844, 847 (Minn. 1980). See also *Rainbow Play Sys., Inc. v. Backyard Ventures Mgmt., LLC*, CIV 06-4166, 2008 WL 4372978 (D.S.D. Sept. 22, 2008); *United States v. Little*, 176 F.R.D. 420, 422 (D. Mass. 1997).

¹³ See Minn. R. 1400.5500.

Even if the disclosure is viewed as untimely, Rogers has failed to establish that he suffered any significant prejudice as a result. Rogers was provided with the list of the Department's witnesses on February 3, 2014, a date that was three weeks before the scheduled start of the hearing. Rogers did not then timely object to the disclosure; he instead waited until three days before the hearing to raise the issue. When offered a continuance in order to cure any potential prejudice with additional discovery, Rogers declined. In an effort to mitigate any potential surprise, prior to admitting the testimony Rogers was afforded the opportunity to depose the one fact witness who was only available to testify on the first day of the hearing, with the costs of such being borne by the Department. Given these facts, and given the lack of any evidence of bad faith or intentional deceit on the part of the Department¹⁴ with respect to its failure to supplement its response to Interrogatory No. 19 and the court's primary interest ascertaining the truth of the matter before it for determination, "blind adherence" to the dictates of Minn. R. 1400.6700 must give way to a full and complete examination of the evidence offered.¹⁵ Therefore, Rogers' motion to exclude as untimely the testimony of the following witnesses is denied: Conservation Officer Sean Williams, Andrew Urban, Barb Soderberg, Kurt Soderberg, Shelly Beyer; Jennifer Westlund; Dr. Jerrod L. Belant (both as a fact and an expert witness) Dr. John Giudice (expert); and David J. Telesco (expert).

T. L. P.

¹⁴ See *Millen v. Mayo Found.*, 170 F.R.D. 462, 467 (D. Minn. 1996) (nondisclosure caused by neglectfulness, rather than bad faith or willful obstruction, is an insufficient rationale for excluding an untimely disclosed expert).

¹⁵ *Tomlin v. Holecek*, 158 F.R.D. 132, 135 (D. Minn. 1994).